TABLE OF CONTENTS
Appendix to Petition

Page

Unpublished Opinion of the
United States Court of Appeals
for the Fourth Circuit
entered August 30, 2006 .....1a

Judgment in a Civil Case of the
United States Court of Appeals
for the Fourth Circuit
entered August 30, 2006 .....4a

Final Order of the
United States District Court
for the Eastern District of Virginia
entered March 14, 2006 .....5a

Judgment in a Civil Case of the
United States District Court
for the Eastern District of Virginia
entered March 14, 2006 .....10a

Report and Recommendation of the
United States District Court
for the Eastern District of Virginia
entered January 31, 2006 .....11a

Order of the
Supreme Court of Virginia
Re: Refusal of Petition for Appeal
entered June 28, 2004 .....26a

Order of the
Circuit Court of the City of Hampton
Re: Denying Petition for a Writ
of Habeas Corpus
undated 27a

Order of the
United States Court of Appeals
for the Fourth Circuit
Re: Denying Petition for Rehearing
Entered October 10, 2006 ..... 33a

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-6583

[ENTERED AUGUST 30, 2006]

CHAD PATRICK O'HANDLEY,
Petitioner - Appellant,

versus

GENE M. JOHNSON, Director, Virginia Department of Corrections,
Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Rebecca Beach Smith, District Judge. (2:05-cv-00113-RBS)

Submitted: August 24, 2006
Decided: August 30, 2006

Before KING, SHEDD, and DUNCAN, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Laurence Dickerson Bragg, THE LAW FIRM OF GOSS & FENTRESS, Norfolk, Virginia, for Appellant. Margaret Winslow Reed, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Chad Patrick O'Handley seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing as untimely his 28 U.S.C. § 2254 (2000) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c) (2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484(2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that O'Handley has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the

materials before the court and argument would not aid the decisional process.

DISMISSED

JUDGMENT

[ENTERED: AUGUST 30, 2006]

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 06-6583
2:05-cv-00113-RBS

CHAD PATRICK O'HANDLEY

Petitioner - Appellant

v.

GENE M. JOHNSON, Director, Virginia Department of Corrections

Respondent - Appellee

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk

---

In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

[ENTERED: MARCH 14, 2006]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CHAD PATRICK O'HANDLEY, #296609,

Petitioner,

v. ACTION NO. 2:05cv113

GENE M. JOHNSON, Director of the
Virginia Department of Corrections,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The instant petition, filed by counsel, alleges violation of federal rights pertaining to Petitioner's conviction on February 6, 2001, in the Circuit Court of the City of Hampton, Virginia, for second degree murder and robbery. Petitioner was sentenced to serve forty (40) years on the murder charge and thirty (3 0) years on the robbery charge, for a total of seventy (70) years imprisonment.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure and Rule 72 of the Rules of the United States District Court for the

Eastern District of Virginia for report and recommendation. The report of the magistrate judge was filed on January 31, 2006, denying Petitioner's motion for an evidentiary hearing and recommending dismissal of the petition. By copy of the report, each party was advised of the right to file written objections to the findings and recommendations made by the magistrate judge. On February 9, 2006, the Court received Petitioner's Objections to the Findings and Recommendations of the United States Magistrate Judge. The Court received no response from Respondent.

Petitioner does not appear to contest the findings that the instant federal habeas petition was filed outside the one-year statute of limitations period set forth in 28 U.S.C. § 2244(d)(1). Instead, Petitioner contends that the statute of limitations does not apply to his case because of his claims of "actual innocence." Petitioner's reliance on Schlup v. Delo, 513 U.S. 298 (1995), as support for that proposition is misplaced. Schlup was a death penalty case involving a state habeas petitioner, whose claims were procedurally defaulted in state court, and who had filed a second federal habeas petition seeking to raise a claim of actual innocence to avoid the court's application of the procedural bar to consideration of the merits of his claims. By contrast, this is not a death penalty case and this is Petitioner's first federal habeas petition. Petitioner's state habeas claims were not procedurally defaulted, but were rejected on the merits by the state courts. Moreover, the United States Supreme Court has never held that an "actual innocence" exception to the one-year statute of limitations applies so as to

excuse a petitioner's failure to timely file his federal habeas petition. See generally, Souter v. Jones, 395 F.3d 577, 589, 597 (6th Cir. 2005) (noting the majority of the circuits allowing for equitable tolling based on actual innocence require the petitioner to diligently pursue his federal habeas claims); Bozman v. Kershaw Correctional Institution, 2006 WL 516734, *2 (D.S.C. Mar. 1, 2006) (adopting the reasoning of the Fifth and Eighth Circuits to require a showing of "reasonable diligence" to excuse the filing of a federal habeas petition outside the one-year limitations period). Further, the Fourth Circuit Court of Appeals continues to apply the "extraordinary circumstances" test set forth in Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003), cert. denied, 541 U.S. 905 (2004), in which equitable tolling of the limitation period is appropriate only when a petitioner "presents (1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time." 339 F.3d at 246.

In this case, Petitioner simply failed to file timely his petition for a writ of habeas corpus in this court. The federal petition was due to be filed by October 27, 2004 (including the applicable tolling of the statute of limitations for the time period during which Petitioner's state habeas petition was pending), but the petition was not filed until 121 days later, on February 25, 2005. Petitioner offers no reasons for the dilatory filing of the federal petition, let alone any reasons that would satisfy any of the three elements set forth in Rouse, 339 F.3d at 246. See also, Harris v. Hutchinson, 209 F.3d 325, 328-29, 330-31 (4th Cir. 2000) (holding that while

equitable tolling principles applied to statute of limitations cases, errors by the prisoner's collateral review attorney do not justify equitable tolling). "Under long-established principles, petitioner's lack of diligence [in pursuing his rights] precludes equity's operation." Pace v. DiGuglielmo, 544 U.S. ___, 125 S. Ct. 1807, 1815 and n.8 (2005) (citations omitted) (assuming without deciding that the statute of limitations can be equitably tolled and establishing a two-part test for equitable tolling in which the petitioner "bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way"). While Petitioner asserts that there is "new reliable evidence" to support his claim of "actual innocence," this assertion is not supported by the record. The instant federal petition is virtually identical to the state habeas petition filed some twenty months earlier, dismissed on the merits by the state court. There is simply nothing in the record to demonstrate extraordinary circumstances beyond Petitioner's control or external to his own conduct that would have prevented him from filing this federal petition on time. Accordingly, the Court FINDS that Petitioner is not entitled to equitable tolling of the one-year statute of limitations and his federal petition is time-barred.

The Court, having reviewed the record and examined the objections filed by Petitioner to the Magistrate Judge's Report and Recommendation, and having made de novo findings with respect to the portions objected to, does hereby ADOPT AND APPROVE the findings and recommendations set

forth in the report of the United States Magistrate Judge, filed on January 31, 2006, and it is, therefore, ORDERED that the petition be DENIED AND DISMISSED as the petition is time-barred and Petitioner is not entitled to equitable tolling of the statute of limitations. It is, therefore, ORDERED that judgment be entered in favor of Respondent.

Petitioner may appeal from the judgment entered pursuant to this Final Order by filing a written notice of appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from the date of entry of such judgment. Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right." Therefore, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of appealability. See Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) .

The Clerk shall mail a copy of this Final Order to counsel of record for the parties.

/s/ Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

March 14, 2006

[ENTERED: MARCH 14, 2006]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CHAD PATRICK O'HANDLEY,

Petitioner,

v. CASE NO. 2:05cv113

GENE M. JOHNSON, Director of the
Virginia Department of Corrections,

Respondent,

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by the Court. This action came for decision by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Petitioner's Petition for Writ of Habeas Corpus is DENIED and DISMISSED.

DATED: March 14, 2006

ELIZABETH H. PARET, CLERK

By /s/_____
M.J. Cowart, Deputy Clerk

[ENTERED: JANUARY 31, 2006]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CHAD PATRICK O'HANDLEY, #296609,

Petitioner,

v. ACTION NO. 2:05cv113

GENE M. JOHNSON, Director of the
Virginia Department of Corrections,

Respondent.

UNITED STATES MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to the undersigned United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure, and Rule 72 of the Local Civil Rules of the United States District Court for the Eastern District of Virginia.

I. STATEMENT OF THE CASE

A. Background

Petitioner, Chad Patrick O'Handley ("O'Handley"), was convicted by a jury in the Circuit Court of the City of Hampton, Virginia on February

6, 2001, of second degree murder and robbery.[1] O'Handley was sentenced to a serve forty (40) years on the murder charge and thirty (30) years on the robbery charge, for a total of seventy (70) years imprisonment, as reflected in the Court's Sentencing Order of April 17, 2001.

O'Handley filed his petition for appeal in the Court of Appeals of Virginia on August 30, 2001, which denied his petition for appeal initially on November 13, 2001, and then denied it upon motion for reconsideration by a three-judge panel on April 12, 2002. O'Handley appealed that decision to the Supreme Court of Virginia on May 14, 2002, which refused the petition on July 26, 2002. O'Handley did not file a petition for certiorari in the United States Supreme Court.

On June 25, 2003, O'Handley filed a petition for a writ of habeas corpus in the Circuit Court for the City of Hampton. On October 9, 2003, the Court granted Respondent's motion to dismiss the petition and denied the petition on the merits. On January 6, 2004, O'Handley filed a petition for appeal of that decision in the Supreme Court of Virginia. On June 28, 2004, the Court summarily dismissed the petition, finding no reversible error in the lower court's judgment.

---

[1] O'Handley was represented at trial and during his direct appeals by Thomas W. Carpenter, Esq. The instant petition for a writ of habeas corpus was filed by O'Handley's current counsel, L. Dickerson Bragg, Esq., who also represented him during his state habeas petitions.

On February 25, 2005, O'Handley filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[2] On April 5, 2005, Respondent filed a Rule 5 Answer and Motion to Dismiss accompanied by a brief in support. O'Handley filed a response to Respondent's motion to dismiss, which was received by the Court and filed on April 25, 2005.

B. Grounds Alleged

O'Handley now asserts in this Court that he is entitled to relief under 28 U.S.C. § 2254 for the reasons substantially as follow:[3]

> (a) Petitioner was denied the effective assistance of counsel, in that defense counsel failed to call a critical witness, Jon Wolford, as

---

[2] O'Handley remains in the custody of the Virginia Department of Corrections at the Wallens Ridge State Prison; the petition was properly filed in pleading form by his counsel, L. Dickerson Bragg, Esq. On March 10, 2005, the Court entered an order acknowledging that the petition was received and filed on February 25, 2005. The Court further notes that O'Handley's petition also included, at page thirty-five (35), a request for an evidentiary hearing "to resolve all necessary facts for a determination on the issue of effectiveness of counsel . . . ."

[3] O'Handley notes in the preamble to his petition that, if this Court were to grant him a writ of habeas corpus, he would not be entitled to dismissal of the charges for which he was convicted, and that he would be, at most, entitled to a new trial.

a witness at trial, or failed to present his statements at trial if the witness was unavailable;

(b) Petitioner was denied the effective assistance of counsel, in that defense counsel failed to investigate, present, emphasize or argue critical evidence for the defense at trial, including the presence of blood evidence at the crime scene that belonged to Petitioner's son, as well as other blood evidence that could have been subjected to additional testing to determine if it belonged to Petitioner's son;

(c) Petitioner was denied the effective assistance of counsel, in that defense counsel failed to investigate or object to improper evidence introduced at trial, including the results of the search of Petitioner's home by police as well as leading questions asked by the prosecutor of its own witness, Angela Wolford;

(d) Petitioner was denied the effective assistance of counsel, in that defense counsel failed to investigate certain aspects of the case, including not adequately

preparing for the cross-examination of a prosecution witness, Bobby A. Winfree, Jr., and not discovering potentially mitigating evidence to show the jury that Petitioner's father, Michael O'Handley, was mentally and physically abusive;

(e) Petitioner was denied the effective assistance of counsel, in that defense counsel failed to timely move the trial court for an order directing the Commonwealth to disclose discovery and inspection;

(f) Insufficiency of the evidence; and

(g) Abuse of discretion and error by the Circuit Court for the City of Hampton and by the Supreme Court of Virginia, for dismissal of the state habeas petition without holding a hearing on Petitioner's allegations of ineffective assistance of counsel.

O'Handley's state petition for a writ of habeas corpus, filed in the Circuit Court for the City of Hampton on June 25, 2003 and raised on appeal in the Supreme Court of Virginia on January 6, 2004, asserted the very same claims for relief as alleged in

the instant petition,[4] except, of course, for claim (g), which could not have been brought until after the Circuit Court and Supreme Court decided not to grant an evidentiary hearing. The Circuit Court denied the petition on October 9, 2003, dismissing all claims on the merits, and the Supreme Court of Virginia refused the petition for appeal on June 28, 2004, finding no reversible error.

II. PETITIONER'S MOTION FOR AN EVIDENTIARY HEARING

As a preliminary matter, the Court considers O'Handley's request for an evidentiary hearing on his ineffective assistance of counsel claims. The Court has determined that an evidentiary hearing is not required, as purely legal issues are presented and the record before the Court adequately resolves the legal issues raised. See Rule 8(c) of the Rules Governing Section 2254 Cases. Accordingly, the Court DENIES O'Handley's motion for an evidentiary hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Statute of Limitations

O'Handley's petition is barred by the statute of limitations. The statute of limitations for actions

---

[4] The Court notes that Respondent admits O'Handley has therefore properly exhausted all of the remedies available to him through the state courts of Virginia. 28 U.S.C. § 2254(b)(1)(A).

under 28 U.S.C. § 2254 is provided in 28 U.S.C. § 2244(d)(1):

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . .

28 U.S.C. § 2244(d)(1)(A).

Ordinarily, O'Handley would have had one year from the date on which his conviction became final to file a petition for federal habeas corpus. His conviction became final on October 24, 2002, which was ninety (90) days after the July 26, 2002 refusal of his petition for appeal by the Supreme Court of Virginia and the date upon which the period for seeking direct review of his conviction by the United States Supreme Court expired. See U.S. Sup. Ct. R. 13(1); Harris v. Hutchinson, 209 F.3d 325, 328 n.1 (4th Cir. 2000). 'Therefore, without considering any tolling provisions, infra, O'Handley had until October 24, 2003 to file his federal petition for a writ of habeas corpus. O'Handley did not execute the instant federal petition until February 25, 2005, which was approximately 459 days outside the applicable limitation period.

A person in state custody, however, may toll the running of the limitation period during the time in which a properly-filed application for state post-conviction or other collateral proceedings remains pending. 28 U.S.C. § 2244(d)(2). Such an application remains pending throughout the state review process including the time period between a lower state court's decision and the filing of a notice of appeal to a higher state court. Carey v. Saffold, 536 U.S. 214, 220-21 (2002); Rouse v. Lee, 339 F.3d 238, 243-44 (4th Cir. 2003) (a state post-conviction proceeding for § 2244(d)(2) tolling purposes encompasses all state-court proceedings "from initial filing [in the trial court] to final disposition by the highest state court." (quoting Taylor v. Lee, 186 F.3d 557, 561 (4th Cir. 1999))). This tolling provision does not, however, apply to federal habeas petitions. Duncan v. Walker, 533 U.S. 167, 172 (2001).[5]

An application for state post-conviction review is "properly filed" not merely when it is delivered or accepted by the relevant court. Artuz v. Bennett, 531 U.S. 4, 8 (2000). Rather:

> an application is 'properly' filed when its delivery and acceptance are in compliance with the applicable laws

---

[5] The Supreme Court in Duncan v. Walker, 533 U.S. 167, 172 (2001), held that a federal habeas petition is not an "application for state post-conviction or other collateral review" within the meaning of § 2244(d)(2) because the word "state" applies to the entire phrase "post-conviction or other collateral review." As such, only state "other collateral review" tolls the limitation period. Id.

> and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.

Id. Thus, an application that does not conform to such rules, but that is nonetheless accepted by the clerk of a state court, is not a properly-filed application; it is merely a "pending" application that does not toll the limitation period. Id. at 9 (application was not properly filed and limitation period was not tolled where fee was not included with filing) [6] On the other hand, an application that complies with such rules governing filings, but which contains claims that are procedurally barred, is still a properly-filed application that tolls the statute of limitations. Bennett, 531 U.S. at 9.

In this case, the record reflects that O'Handley is entitled to toll the one-year statute of limitations for a total of 369 days, which represents the time period during which his petition for a writ of habeas corpus was pending in the state courts (between June 25, 2003, when the state habeas

---

[6] See also Osborn v. Dotson, 2002 WL 32443533 at *2 (E.D. Va.) (application was not properly filed because it was submitted on improper forms, was not sworn under penalty of perjury, and did not contain a description of facts and procedural history for each claim); Christian v. Baskerville, 232 F. Supp. 2d 605, 607 (E.D. Va. 2001) (petition for appeal was not properly filed because it did not contain a list of errors as required by Va. Sup. Ct. R. 5:17(c)).

petition was initially filed, through and including June 28, 2004, when the Supreme Court of Virginia refused the petition). It follows, therefore, that O'Handley's federal petition for habeas corpus would have been due to be filed on or before October 27, 2004, and he was approximately 121 days after and outside the limitation period when he executed the petition on February 25, 2005.[7]

Accordingly, the Court FINDS that the instant petition is time-barred and that it should be DENIED.

B. Allegations of Actual Innocence

In his response to Respondent's Motion to Dismiss, O'Handley does not appear to contest the computations that indicate his petition is time-barred. Instead, O'Handley, citing Schlup v. Delo, 513 U.S. 298 (1995), asserts that "[t]he statute of limitations does not apply to cases asserting actual

---

[7] Measuring from the date of O'Handley's final conviction, October 24, 2002, a total of 244 days elapsed until O'Handley filed his state habeas petition in the Circuit Court for the City of Hampton on June 25, 2003. This left only 121 days remaining on the one-year statute of limitations. The statute of limitations was then tolled for 369 days during the pendency of O'Handley's state habeas petition in the state court, supra. The statute of limitations then began to run again, and it expired 121 days later on October 27, 2004. O'Handley did not file the instant federal petition until another 121 days had passed.

innocence."[8] The Court construes O'Handley to argue that any failure to timely file his federal petition for a writ of habeas corpus should be excused because he is actually innocent, and therefore the statute of limitations should be

---

[8] The Court notes that O'Handley grossly overstates the import of that case, which held, inter alia, that a habeas corpus petitioner whose claims have been procedurally defaulted, but who relies on a claim of actual innocence, must "show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent'" and "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" upon the discovery of some "new reliable evidence . . . that was not presented at trial." Schlup, 513 U.S. at 324, 327 (citing Murray v. Carrier, 477 U.S. 478, 496 (1986)). Taken to the extreme, O'Handley's argument would produce the unreasonable result that a petitioner need never be concerned with the running of the statute of limitations, so long as he intends to rely on a claim of actual innocence. This does not accurately state the law. Indeed, the claim of actual innocence is not an invitation for a petitioner to needlessly delay in pursuing his petition for habeas corpus relief. The Court notes that O'Handley has been represented by the same counsel throughout the habeas process, yet there is no explanation anywhere in the petition for the almost eight-month delay between the conclusion of direct review of his habeas petition in the state court and his having filed the instant petition in this Court. Moreover, the Court notes that the verbiage in the state habeas petition is almost identical to that used in the instant petition, except for that portion of the instant petition regarding the state courts' failure to grant an evidentiary hearing on O'Handley's ineffective assistance of counsel claims. There is no mention of any newly-discovered evidence, or, for that matter, is there any discussion of potentially-new information not already considered by the state courts in denying the state habeas petitions. This further reinforces the notion that the delay in filing the instant petition was not excused or explained by the discovery of new evidence.

equitably tolled. Equitable tolling of the limitation period, however, is appropriate only when a petitioner "presents (1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time." Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003). " [A]ny resort to equity must be reserved for those rare instances where - due to circumstances external to the party's own conduct - it would be unconscionable to enforce the limitation period against the party and gross injustices would result." Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000); Little v. United States, 184 F. Supp. 2d 489, 494 (E.D. Va. 2002).

To establish a claim of actual innocence, a petitioner must "support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324 (1995). Moreover, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id. at 327. Indeed, " [b]ecause such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." Id. at 324.

In this case, O'Handley's claims of actual innocence rely on the identical claims made in his state habeas petitions; he presents no new or newly-discovered evidence. A mere claim of actual innocence does not constitute an exceptional circumstance sufficient to justify equitable tolling. Felder v. Johnson, 204 F.3d 168, 171 (5th Cir. 2000). Instead, O'Handley's claims focus on the alleged errors committed by his trial counsel during the

conduct of the trial and/or the failure to properly prepare the case for trial - each of which were duly considered and rejected by the Circuit Court, under the teachings of Strickland v. Washington, 466 U.S. 668 (1984), as "tactical decisions" by trial counsel and that were, at best, "speculative and conclusory" as to the impact such decisions would have had on the verdict at trial. There has been no showing that any newly-discovered evidence or information exists that would satisfy the "new reliable evidence" standard set forth in Schlup, supra. Further, even assuming such evidence did exist, O'Handley fails to show any circumstances, attributable to Respondent or any other external cause, which prevented him, in the exercise of due diligence, from discovering any such new, reliable and relevant facts soon enough for him to file a timely federal habeas petition. See Flanders v. Graves, 299 F.3d 974, 977-78 (8th Cir. 2002); Workman v. Bell, 227 F.3d 331, 342 (6th Cir. 2000) {"[I]f a prisoner purposefully or by inadvertence lets the time run under which he could have filed his petition, he cannot file a petition beyond the statutory time, even if he claims 'actual innocence.'").

As such, the Court FINDS that O'Handley has failed to allege sufficient facts to demonstrate extraordinary circumstances that were beyond his control or external to his own conduct, and which prevented him from timely filing a federal habeas petition in this Court. Accordingly, the Court FINDS that O'Handley is not entitled to equitable tolling of the statute of limitations and that the petition is time-barred.

IV. RECOMMENDATION

For the foregoing reasons, the Court, having denied O'Handley's motion for an evidentiary hearing, recommends that O'Handley's petition for a writ of habeas corpus be DENIED, that Respondent's motion to dismiss be GRANTED, and that all of O'Handley's claims be DISMISSED WITH PREJUDICE.

V. REVIEW PROCEDURE

By copy of this Report and Recommendation, the parties are notified that:

1. Any party may serve upon the other party and file with the Clerk specific written objections to the foregoing findings and recommendations within ten (10) days from the date of mailing of this report to the objecting party, see 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, plus three (3) days permitted by Rule 6(e) of said rules. A party may respond to another party's specific objections within ten (10) days after being served with a copy thereof. See Fed. R. Civ. P. 72 (b).

2. A district judge shall make a de novo determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and

recommendations set forth above will result in a waiver of the right to appeal from a judgment of this Court based on such findings and recommendations. Thomas v. Arn, 474 U.S. 140 (1985); Carr v. Hutto, 737 F.2d 433 (4th Cir. 1984); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

/s/
United States Magistrate Judge

Norfolk, Virginia
January 31, 2006

Clerk's Mailing Certificate

A copy of the foregoing Report and Recommendation was mailed this date to the following:

Laurence Dickerson Bragg, Esq.
St. Clair & Bragg
2317 East Little Creek Road
Norfolk, Virginia 23518-3205

Margaret W. Reed, Esq.
Assistant Attorney General
Office of the Attorney General
900 E. Main Street
Richmond, Virginia 23219

Elizabeth H. Paret, Clerk

By: /s/
Deputy Clerk
January 31, 2006

[ENTERED: June 28, 2004]

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 28th *day of* June, 2004.

Chad Patrick O'Handley, Appellant,

against Record No. 040250
Circuit Court No. CL03-542

Gene M. Johnson, Director,
Virginia Department of Corrections, Appellee.

From the Circuit Court of the City of Hampton

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia H. Krueger, Clerk

By: /s/ _____
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF HAMPTON

CHAD PATRICK O'HANDLEY,

Petitioner,

v. CL03-542

GENE M. JOHNSON, DIRECTOR, DEPARTMENT OF CORRECTIONS,

Respondent.

ORDER

Upon mature consideration of the petition of Chad P. O'Handley, by counsel, for a writ of habeas corpus and the respondent's motion to dismiss and the authorities cited therein, and a review of the record in the criminal cases of Commonwealth v. Chad O'Handley, (00-1209) (second degree murder and robbery), which is hereby made a part of the record in this matter, the Court is of the opinion that the motion should be granted and the writ should not issue.

In Claim (a.I), petitioner alleges counsel was ineffective for failing to present Jon Wolford's testimony or, in the alternative, his prior statements to law enforcement. This claim is dismissed because counsel's affidavit demonstrates that he made a sound tactical decision not to call Wolford as a

witness or to introduce Wolford's statements because he believed Wolford would be impeached with his prior inconsistent statements. See Darden v. Wainwright, 477 U.S. 168, 186 (1986). This claim is also dismissed because petitioner has failed to satisfy either prong of Strickland v. Washington, 466 U.S. 668 (1984).

In Claim (a.II.), petitioner alleges trial counsel was ineffective because he "failed to investigate, present, emphasize, or argue [DNA] evidence critical for the defense at trial." Specifically, petitioner contends trial counsel should have highlighted the fact that his son's blood was found on a piece of evidence recovered from the crime scene.

Counsel's affidavit demonstrates that he made a tactical decision to present Noah's injury to the jury through the testimony of his mother and grandmother. This claim is dismissed because counsel's decision was reasonable.

Petitioner claims additional DNA testing should have been conducted because, there is a reasonable probability that evidence of Noah's blood on the leash, a box, and a fire extinguisher would have produced a different outcome of the case. This claim is also dismissed because it is conclusory and speculative whether additional testing would have revealed further evidence of Noah's DNA. See Penn v. Smyth, 188 Va. 367, 370-71, 49 S.E.2d 600, 601 (1948).

In addition, this claim is dismissed because petitioner has failed to satisfy either prong of Strickland.

In Claim (a.III.), petitioner claims counsel was ineffective for failing to "investigate or object to improper evidence introduced at trial."

Insofar as this claim relates to the search warrant and subsequent search of petitioner's home, it is dismissed because it does not provide sufficient facts to support a cognizable claim of ineffective performance as required by Strickland and its progeny.

In any event, counsel's affidavit demonstrates that he thoroughly reviewed the search warrant and found no defects or legitimate basis for challenging it. Moreover, the record indicates that the officers obtained consent from Wolford to search. Therefore, this portion of the claim is dismissed because counsel is not ineffective for failing to file a fruitless motion. See Clanton v. Bair, 826 F.2d 1354, 1359 (4th Cir. 1987), *cert. denied*, 484 U.S. 1036 (1988).

Petitioner also claims counsel was ineffective for failing to object to leading questions when Angela Wolford testified for the Commonwealth. This portion of the claim is dismissed because counsel's decision not to object to leading questions during Angela Wolford's direct testimony was the result of sound trial strategy.

Finally, the entire claim is dismissed because petitioner has failed to satisfy either prong of Strickland.

In Claim (a.IV.), petitioner alleges counsel was ineffective for failing to investigate "certain aspects of the case."

Bobby Winfree

According to petitioner, if trial counsel had adequately and diligently prepared for the cross-examination of Winfree, he "may" have discovered a letter written by Winfree to Rob Gagliotti that would have provided a reason for Winfree to fabricate his testimony and testify for the Commonwealth.

This claim is dismissed because it is speculative and conclusory to allege that counsel's pre-trial investigation of Winfree was unreasonable simply because it *might have* yielded this letter.

In addition, the record demonstrates that trial counsel cross-examined Winfree about his bias against O'Handley, his hope that he would get consideration in criminal cases in exchange for his testimony, and his criminal record. Trial counsel's closing argument stressed that Winfree had reasons to testify for the Commonwealth. Therefore, this claim is also dismissed because it fails to satisfy either prong of Strickland.

Sentencing

Petitioner claims trial counsel was ineffective because he failed to discover mitigating evidence that the petitioner's father, Michael O'Handley, was mentally and physically abusive. This claim is dismissed because O'Handley failed to timely inform trial counsel of this evidence. In fact, counsel's affidavit demonstrates that O'Handley had denied any history of abuse or mental illness when questioned by trial counsel.

This claim is also dismissed because it fails to satisfy either prong of Strickland.

In Claim (a.V.), petitioner alleges trial counsel was ineffective for failing to move for a discovery order. Trial counsel's affidavit reveals that he and the Commonwealth engaged in extensive discovery, and trial counsel had access to the Commonwealth's file and evidence. A discovery order was not necessary.

Therefore, this claim is dismissed because it fails to satisfy either prong of Strickland.

Claim (b) challenges the sufficiency of the evidence. This claim is dismissed because it is procedurally barred under Henry v. Warden, Riverside Regional Jail, 265 Va. 246, 248, 576 S.E.2d 495, 496 (2003).

The Court thus is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore,

ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed.

The Clerk is directed to forward a certified copy of this Order to counsel for the petitioner, Laurence D. Bragg, Esquire, the respondent, and Margaret W. Reed, Assistant Attorney General.

Entered this ___ day of_____, 2003.

_____
Judge

I ask for this:

/s/ Margaret W. Reed
counsel for respondent

Seen and Objected to, for all the reasons stated in the Petitioner's Petition for a Writ of Habeas Corpus, and because the Circuit Court For the City of Hampton has denied the Petitioner's request to present evidence and be heard on the merits of this Petition.

/s/ Laurence D. Bragg
counsel for petitioner

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED October 10, 2006

[ENTERED OCTOBER 10, 2006]

No. 06-6583
2:05-cv-00113-RBS

CHAD PATRICK O'HANDLEY

Petitioner - Appellant

v.

GENE M. JOHNSON, Director, Virginia Department of Corrections

Respondent - Appellee

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge King, Judge Shedd, and Judge Duncan.

For the Court,

/s/ Patricia S. Connor

CLERK